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January 25, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92

Dear Ms. Dortch,:

AT&T Corp. ("AT&T") submits this ex parte letter to respond to Verizon's latest white paper submission in the above-captioned proceedings.[1]

Until recently, Verizon has been arguing on both statutory and policy grounds that CLECs should pay access charges for all "virtual NXX" and ISP-bound traffic that travels beyond the local exchange. AT&T previously demonstrated that Verizon's statutory arguments are baseless.[2] Equally important, AT&T and numerous other commenters have shown in detail that Verizon's proposed policy would have severe anticompetitive consequences. In particular, it would all but destroy CLECs' ability to offer virtual foreign exchange ("Virtual FX" or "Virtual NXX") services in competition with the ILECs, and it would have especially severe consequences for dial-up access to ISPs in rural areas (and increasingly VoIP services), which

[1] "Verizon's Treatment of All Types of Interexchange Calls – Including Virtual NXX Calls – Is Consistent with the Commission's Existing Rules Which Exclude All Such Calls From Reciprocal Compensation and ISP Intercarrier Compensation," attached to Letter from Donna Epps to Marlene Dortch, dated January 7, 2005 ("White Paper").

[2] AT&T 5/23/04 Ex Parte.

depend on such virtual NXX services.[3] And it could also impair the Commission's ability expeditiously to carry out comprehensive intercarrier compensation reform.[4]

Verizon has now apparently concluded that it cannot prevail on either its statutory or policy arguments, and that the Commission is likely to adopt a rational intercarrier compensation system going forward that is at odds with Verizon's anticompetitive policy preferences. Accordingly, Verizon's latest White Paper attempts to salvage what it can by arguing that, regardless of what the statute and sound policy might mandate, the Commission's existing rules, as written, preclude reciprocal compensation for *all* types of traffic that originates in one local calling area and terminates in another, and that "until the Commission amends its rules it must enforce its existing rules, including as they may apply to Virtual NXX calls." White Paper at 1. These latest claims are equally baseless. The Commission's existing rules simply do not contain the limitations Verizon is belatedly attempting to manufacture. And such an "interpretation" of the existing rules would inflict needless anticompetitive harm on consumers who use Virtual FX, VoIP, and rural ISP services.

CLEC Foreign Exchange Offerings. Verizon argues that CLEC foreign exchange offerings, or so-called "virtual NXX" offerings, are not subject to reciprocal compensation under the Commission's existing rules. *See* White Paper at 4-7; 47 C.F.R. §§ 51.701(b)(1) & 51.703. Verizon insists that such services are indistinguishable from long distance services and that such services involve "exchange access" within the meaning of the Act. White Paper at 4-7. Verizon is wrong on both the facts and the law.

As Verizon notes, current Rule 51.701(b)(1) provides that the exchange of telecommunications traffic is subject to reciprocal compensation, except when the "telecommunications traffic" is "interstate or intrastate exchange access, information access, or exchange services for such access." The Commission has explained that the purpose of this rule is to exclude traffic "carved out" by § 251(g) from the immediate application of § 251(b)(5), and that the rule thus incorporates the statutory definition of "exchange access" (as used in § 251(g)).[5] Contrary to Verizon's contention, however, CLEC Virtual FX offerings clearly do *not* involve "exchange access" within the meaning of the Act.

"Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purposes of the origination or termination of telephone toll services." 47 U.S.C.

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[3] *See, e.g.*, Level 3 12/10/04 Ex Parte.

[4] *See* Intercarrier Compensation Forum 10/05/04 Ex Parte (proposing new intercarrier compensation rules).

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd. 9151, ¶¶ 31-39 (2001) ("*ISP Remand Order*"), *remanded but not vacated*, *WorldCom Inc.* v. *FCC*, 288 F.3d 429 (D.C. Cir. 2002).

§ 153(16). "Telephone toll service," in turn, is defined as "telephone service between stations in different exchange areas *for which there is made a separate charge not included in contracts with subscribers for exchange service*." *Id.* § 153(48) (emphasis added). CLECs' virtual FX offerings, however, do not qualify as "toll service" because CLECs do not assess a "separate charge" to end users who use that option; rather, they include the FX offering as part of their basic local service package.[6] Thus, the linchpin of Verizon's entire argument – that CLECs impose toll charges on virtual NXX customers (*see* White Paper at 5) – is simply incorrect.

Moreover, Verizon ignores that the Commission has repeatedly recognized that FX (and Virtual-FX) traffic is not a toll service involving "exchange access;" rather, it has *always* been considered *non-toll* traffic.[7] Verizon's only citation for its contrary position is *AT&T Corp. v.*

[6] Unlike the ILECs' networks, in which a single switch serves only the customers within a given local exchange, CLECs' networks are designed to allow customer from many ILEC local exchange offices to be served by the same switch. Because of this fact, it is not necessary for a CLEC such as AT&T to use a remote dial tone configuration to provide an FX-like arrangement that provides its customers with the same functionality as an ILEC's FX service. AT&T's local exchange service allows customers to be assigned a telephone number associated with a location that is different from the customer's actual location. However, all of the NPA-NNXs AT&T uses to provide its "virtual FX" service, including both the "foreign" exchange NPA-NXX and the "native" NPA-NXX associated with the customer's physical location, are assigned to AT&T, and all of those codes reside in the *same* AT&T switch (wire center). As a result, unlike the ILEC, AT&T does not require private line arrangements to connect two separate wire centers, *i.e.*, the one serving the customer and the one serving the foreign NPA-NXX. Rather, the customer's local loop is *already connected* to the switch serving the foreign NPA-NXX. Accordingly, AT&T offers this local service option, which is very attractive to local telephone customers with an inbound or outbound traffic requirement in a particular area, as a part of certain multi-line business exchange services at no additional charge.

[7] *See, e.g.*, Memorandum Opinion and Order, *Application by Verizon Maryland Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, 18 FCC Rcd. 5212, ¶ 149 n. 595 (2003) ("Traditional FX service . . . occurs when the ILEC connects the subscribing customer, via a dedicated private line for which the subscriber pays, to the end office switch in the distant rate center from which the subscriber wishes callers to be able to reach him *without incurring the toll charges*") (emphasis added); Memorandum Opinion and Order, *Petition for Declaratory Ruling that Tariffs Filed with a State Public Utility Commission Cannot Impose Surcharges on Interstate Private Line Subscribers for Exchange Access*, 88 F.C.C.2d 934, at ¶ 3 (1981) ("Foreign exchange (FX) service normally enables a subscriber to place calls to telephones in a 'foreign' (i.e., distant) exchange *without paying MTS* ('Message Telecommunications Service' – *i.e.*, ordinary long distance toll service) *charges*, and enables persons in the foreign exchange area to place calls to the FX subscriber by dialing a local number *without paying MTS charges* or using operator assistance to make a collect call") (emphasis added).

Bell Atlantic-Pennsylvania, 14 FCC Rcd. 556, ¶¶ 71, 80 (1998) ("*AT&T* v. *Bell Atlantic*"), but that case does not remotely support the claim that traditional FX service involves "exchange access" as defined in the Act. That case involved only *interstate* foreign exchange services, and, in all events, the question whether such services fall within the statutory definition of "exchange access" was not at issue. Moreover, the very paragraph that Verizon cites explains that traditional FX service "gives the subscriber a dial tone presence in the distant exchange *without additional toll charges*"[8] – which simply confirms that FX services are not "telephone toll services" and thus do not involve "exchange access" under the Act.

For the same reasons, Verizon's attempt to analogize virtual NXX traffic to intraLATA toll calls, rather than traditional FX services, is incorrect. *See* White Paper at 6. CLECs' virtual FX services do not involve a toll charge. Indeed, the Commission itself has expressly noted that Verizon's *own* foreign exchange service, which allows interexchange calling at local rates (and with which the CLECs' virtual NXX service competes), is analogous to virtual NXX services. *Starpower Communications v. Verizon South*, 18 FCC Rcd. 23625, ¶ 10 ("*Starpower Damages Order*") ("Verizon South provides a service [FX service] to its own customers that is similar to the [CLEC's] virtual NXX service . . . Verizon South rates calls to and from its Foreign Exchange customers as local or toll based upon the telephone number assigned to the customer (not the physical location of the customer), and it bills and collects reciprocal compensation for calls that it rates as local").[9]

Verizon's basic position regarding reciprocal compensation for virtual NXX traffic is also irrational, because it would effectively negate the equally important rule that a CLEC is permitted to choose a single point of interconnection ("POI") in each LATA.[10] There is no question that new entrants cannot economically deploy switches in every local calling area in a LATA, as the incumbents do; instead, they typically deploy a single switch to serve many areas and rely on transport facilities to "backhaul" traffic from many localities.[11] But under Verizon's approach, reciprocal compensation would not apply unless the CLEC had a POI in the same local calling area; in other words, a CLEC would not be able to offer its foreign exchange services in competition with the incumbent unless it literally established a POI in *each* local calling area

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[8] *AT&T* v. *Bell Atlantic*, ¶ 71 (emphasis added).

[9] Verizon now claims that its traditional FX service is in fact subject to access charges rather than reciprocal compensation, but that it has not attempted to establish arrangements for the billing of such access charges because of the relatively small volumes involved. As the *Starpower Damages Order* (¶ 12-14) makes clear, however, Verizon's own tariffs classify and rate its FX services as *local*, not toll, services. Therefore, such services could not involve "exchange access" within the meaning of the statute (or the reciprocal compensation rule).

[10] 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a)(2); *Virginia Arbitration Order* ¶¶ 52-53.

[11] *See, e.g.*, AT&T Reply Comments, CC Docket No. 01-92, at 38-41 (Nov. 5, 2001).

where it wanted to offer the service. Thus, Verizon's proposed rule would not only insulate it from all competition for foreign exchange services; it would deprive a CLEC of its statutory right to choose its POI with the ILEC.[12] And as many commenters have noted, Verizon's position would have especially severe consequences for ISPs serving rural areas. Without virtual NXX arrangements, those ISPs would have to establish a server in every local calling area in a LATA – an economic impossibility.[13]

In all events, Verizon implicitly concedes in a footnote (White Paper at 4 n.4) that recent FCC orders indisputably establish that the existing rules do not *preclude* reciprocal compensation for CLEC virtual FX services. For example, in the *Virginia Arbitration Order*, the Wireline Competition Bureau found that using NPA-NXX codes to determine whether a wireline call was local was the universally accepted industry practice and that Verizon had not suggested any workable alternative.[14] Accordingly, the Bureau correctly ordered Verizon to pay reciprocal compensation for virtual NXX traffic – in keeping with the consistent, industry-wide historical practice that FX services are treated and billed as local calls. Similarly, in the *Starpower Damages Order*, the Commission ordered Verizon to pay Starpower past *reciprocal compensation* that Verizon owed for virtual NXX traffic.[15] Although Verizon now urges the Commission to "enforce its current rules" in some undefined way (White Paper at 1), those rules could not possibly call into question any state commission decision or interconnection agreement requiring reciprocal compensation for virtual NXX calls, given that the Commission itself has ordered Verizon to pay reciprocal compensation for such calls in both a § 252 arbitration and a damages action.

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[12] Despite the fact that ILECs often depict an interLATA virtual NXX arrangement when diagramming virtual NXX arrangements, *see, e.g.*, BellSouth 1/11/05 Ex Parte, all of the virtual NXX arrangements that AT&T markets (both ISP-bound and non-ISP-bound) are *intra*LATA arrangements.

[13] *See, e.g.*, Level 3 12/10/04 Ex Parte; ALTS 9/22/04 Ex Parte at 3-4 & n.4. It is important to underscore that CLEC virtual FX services impose *no* additional costs on ILECs. An ILEC's costs to deliver a call to AT&T do not vary depending on whether the call is destined to a customer in the calling party's "native" rate center or a customer in a "foreign" rate center. Under the Commission's rules, AT&T specifies a single POI for an NPA-NXX, regardless of the physical location of the AT&T terminating customer. Since the POI to which SBC delivers traffic for AT&T customers served by both the "native" and "foreign" ILEC offices is the same, SBC's network costs to deliver traffic to that POI are necessarily the same, regardless of where AT&T ultimately routes the traffic to the end user.

[14] *Virginia Arbitration Order*, 17 FCC RCd. 27039, ¶ 300 (2002) ("Verizon concedes that the NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide").

[15] *Starpower Damages Order*, 18 FCC Rcd. 23625, ¶¶ 11-17 (2003).

ISP-Bound Traffic. Verizon also claims that the Commission's existing rules do not authorize reciprocal compensation for ISP-bound traffic that "leaves the local exchange." White Paper at 7-9. But Verizon cannot cite to anything in the *ISP Remand Orde* that indicates the Commission intended to place such limitations on its interim rules governing intercarrier compensation for ISP-bound traffic. To the contrary, the first sentence of the order made clear that the interim rules govern "telecommunications traffic delivered to Internet service providers" – a term not limited to "local" ISP traffic.[16]

Rather than referring to the *ISP Remand Order*, Verizon bases its entire argument on stray dictum in the opening paragraph of the D.C. Circuit's opinion in *WorldCom, Inc.*, 288 F.3d at 430 (D.C. Cir. 2002). There, the Court stated – *not* that the interim rules applied only to local ISP-bound calls – but that the Commission had held that § 251(g) authorized it to exempt "calls made to [ISPs] located within the caller's local calling area" from the scope of § 251(b)(5). Even Verizon would surely agree (*see* White Paper at 7) that the Court misstated the Commission's statutory holding. The Commission clearly purported to exempt *all* ISP-bound traffic from § 251(b)(5), not just ISP-bound calls within the "local calling area."[17] Indeed, if the Court's statement were taken literally, § 251(b)(5) reciprocal compensation would apply to non-local ISP-bound traffic delivered through virtual NXX arrangements, because the Commission held quite clearly that § 251(b)(5) applies to all traffic that is not carved out by § 251(g).[18] In all events, the Court's statement did not purport to be an authoritative interpretation – or even description – of the scope of the interim rules, and the *ISP Remand Order* itself nowhere suggests that the interim rules do not apply to all ISP-bound traffic.[19]

Verizon is also incorrect that the only purpose of the interim ISP-bound traffic rule was to eliminate "arbitrage" *within* the local exchange. White Paper at 9. To the contrary, the *ISP Remand Order*'s logic fully supports the Commission's broad, categorical language extending the interim rules to *all* ISP-bound traffic. In that order, the Commission found that *all* ISP-bound traffic was jurisdictionally interstate, and asserted intercarrier compensation authority over all such traffic.[20] Thus, the Commission's new interim regime displaces *all* state regulation of such

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[16] *ISP Remand Order* ¶ 1; *see also id.* ¶ 31 (the terms "telecommunications" and "telecommunications traffic" refer to all traffic, not just local traffic); *id.* ¶ 44.

[17] *See, e.g., ISP Remand Order* ¶¶ 36-37, 42.

[18] *Id.* ¶¶ 31-37, 54.

[19] The Court's own description of a Commission order later in the same opinion applies equally here: "such explanatory language can't be assumed to be exclusive; legislative or agency explanations of a provision may naturally tend to focus on its most salient features." 288 F.3d at 433.

[20] *ISP Remand Order* ¶¶ 52-65.

traffic, including rules that might have applied to non-local intrastate or intraLATA calling. *Id.* ¶ 82 ("[b]ecause we now exercise our authority under section 201 [of the 1996 Act] to determine the appropriate intercarrier compensation for ISP-bound traffic . . . state commissions will no longer have authority to address this issue"). And although the Commission believed that the previous system resulted in certain market distortions, that was "due primarily to the one-way nature of this traffic," and had nothing to do with whether the call originated and terminated in the same local calling area.[21] Thus, the Commission established a *single* interim regime to govern all ISP-bound traffic, including dial-up access in rural areas through the use of non-local calling.

Wireless and VoIP Services. Finally, contrary to Verizon's assertion, its treatment of intercarrier compensation for wireless services has no implications for virtual FX or ISP-bound traffic. As Verizon notes, the Commission adopted a *special* rule for wireless traffic, which applies reciprocal compensation to any call that originates and terminates within an MTA, "based on the location of the parties at the beginning of the call."[22] Accordingly, Verizon's intercarrier compensation arrangements for wireless calls incorporate supplemental information provided by the IXC that Verizon uses, in conjunction with its own call detail records, to assign the proper jurisdiction to wireless roamer calls based on the geographic location of the call origination, rather than the NPA-NXXs of the originating and terminating numbers. White Paper at 12. Verizon is to be commended for its approach to intercarrier compensation for wireless calls; other ILECs simply rely on the NPA-NXX, which results in intrastate access charge billing for interstate calls involving "roaming" wireless customers. Verizon's approach to wireless calls is appropriate, however, *only* because the Commission's wireless reciprocal compensation rule -- in contrast to its other reciprocal compensation rules -- is expressly based on the location of the parties and because the Commission recognized that simple reliance on NPA-NXXs would result in wildly inaccurate compensation for wireless roamer calls. The Commission's other reciprocal compensation have an entirely different basis: they are expressly based on whether the traffic is bound for an ISP or, for non-ISP-traffic, whether the traffic is "exchange access" under the statute, regardless of whether the parties are in the same ILEC local calling area.

With respect to VoIP traffic, Verizon recognizes that its interpretation of the existing rules (limiting reciprocal compensation to calls that stay within a single ILEC-defined local calling area) would have severely negative consequences for the development of those services. White Paper at 13-14. Thus, Verizon acknowledges that the Commission may imminently adopt a different compensation rule for VoIP services (*id.* at 13-14), and that carriers could justifiably delay investment in billing systems for "more precise methods of intercarrier compensation" in anticipation of such rules (*id.* at 14). But Verizon's cramped reading of the reciprocal

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[21] *Id.* ¶ 69.

[22] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1044 (1996).

compensation rule would have exactly the same anticompetitive effects for other types of traffic, including traditional voice and ISP-bound traffic. Therefore, its implicit admission that the rules would be anticompetitive for VoIP simply underscores the fundamentally anticompetitive nature of its entire approach to intercarrier compensation. Rather than straining to interpret the existing rules in a manner that would retard competition and protect Verizon's monopoly position, the Commission should expeditiously and expressly reject Verizon's belated efforts to misinterpret the existing rules.

Very truly yours,

/s/ David L.Lawson

David L. Lawson